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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 930

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, AND CEMENT FINISHERS' UNION NO. 3, FLORIDA

Petitioner,

versus

CONE BROTHERS CONTRACTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Brooksville, Florida

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THE FREE PRESS TAMPA FLORIDA

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versus

CONE BROTHERS CONTRACTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

This is a Petition seeking a review of the decision rendered in the case of CONE BROTHERS CONTRACTING COMPANY, Appellant, versus BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, and CEMENT FINISHERS' UNION NO. 3, FLORIDA, Appel-

lee, as found in the Official Reporter Volume 263 Federal 2nd, page 297 and the companion case of TAMPA SAND and MATERIAL COMPANY, Appellant, versus BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS and CEMENT FINISHERS' UNION NO. 3, FLORIDA, Appellee, found in Volume 263 Federal 2nd, page 300. A copy of said opinion together with the dissent is appended to this Petition as provided by the rules of this Court.

The judgment of reversal in the above said cases was entered by the United States Court of Appeals for the Fifth Circuit on February 3, 1959. The Order denying Petitioner's Petition for Rehearing in the above cases was entered March 11, 1959 by the above said Court.

The Supreme Court of the United States has jurisdiction to review the decisions entered in the above styled cases in that the United States Court of Appeals has decided an important question of Federal Law which has not been settled by this Court.

QUESTION INVOLVED

POINT ONE

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN HOLDING THAT RESPONDENT'S ALLEGATIONS IN THE COMPLAINT CONTAINED FACTS GIVING THE FEDERAL DISTRICT COURT JURISDICTION WHERE IT AFFIRMATIVELY APPEARED ON THE FACE OF THE SAID COMPLAINT THAT THE ACTIVITY INVOLVED WHERE THE LABOR DISPUTE

AROSE WAS A LOCAL ACTIVITY WHEN NO OUT-OF-STATE GOODS WERE BEING USED IN THE CONSTRUCTION OF SAME.

POINT TWO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN ALLOWING THE RESPONDENT TO PERFECT ITS APPEAL WHERE IT AFFIRMATIVELY APPEARED IN THE CERTIFIED TRANSCRIPT OF RECORD WHICH IS APPENDED HERETO THAT THE RESPONDENT (Tr. 8) (A-8) APPEALED FROM THE ORDER ENTERED BY THE DISTRICT COURT ON THE 13th DAY OF MARCH, 1958, WHICH WAS A NON-FINAL ORDER CONTEMPLATING FURTHER PROCEEDINGS IN THE NATURE OF AN AMENDMENT (Tr. 5-6) (A-5-6) WHEREAS SAID APPEAL SHOULD HAVE BEEN TAKEN FROM THE FINAL ORDER OF DISMISSAL ENTERED ON THE 7th DAY OF APRIL, 1958 (Tr. 5-7) (A-5-7)

CONSTITUTION AND STATUTORY

"The congress shall have power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." Section 8, Article I of the Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Tenth amendment United States Constitution.

The term "affecting commerce" is defined in Section 2 (7) of the Act (29 U.S.C.A. 152 (7)):

"Section 2. When used in this Act. . . .

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The action herein was brought under the provisions of Section 303 of the Act (29 U.S.C.A. 187), said section being set out in full in the Appendix. As far as pertinent, that section provided:

"Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization . . . (to engage in certain specified activity).

(b) . . . (Whoever is injured in his business or property by the above specified activity may sue in any District Court without respect to the amount in controversy, or in any other court having jurisdiction of the parties) . . ."

STATEMENT OF THE CASE

On December 6, 1957, Cone Brothers Contracting Company, and Tampa Sand and Material Company, Appellants below in companion cases, filed in the United States District Court, Southern District of Florida, a complaint.

The complaint alleged:

1. The existence of a dispute between Petitioners and Acme Tile and Terrazzo Company, a sub-contractor working on a job with Appellant (Tr. 1-3; complaint paragraphs 1, 5, 6, 7) (A-1-3);

2. Picketing at a job site at which Respondent was working (Tr. 1-3; complaint paragraphs 1, 8) (A-1, 3);

3. That the purpose of the picketing was to force the Respondent to cease doing business with Acme Tile and Terrazzo Company, so that the said Acme Tile and Terrazzo Company would be compelled to recognize the Petitioner, although Petitioner had not been certified as representative of Acme Tile and Terrazzo Company's employees (Tr. 1-3; complaint paragraphs 1, 8, 9) (A-1, 3);

4. That certain employees of Respondent were induced by Petitioner to leave the job (Tr. 1-3; complaint paragraphs 1, 8, 9) (A-1, 3);

5. That Respondent was and has been engaged in an industry affecting interstate commerce (Tr. 2; complaint paragraph 3) (A-2);

6. That the activity of Petitioner resulted in damage to Respondent (Tr. 3; complaint paragraph 10) (A-3).

Thereafter, on December 20, 1957, Petitioner filed a Motion to Dismiss the complaint, stating as the two grounds relied upon (Tr. 4-5) (A-4-5):

"1. The complaint fails to state a claim upon which relief can be granted.

"2. The Court lacks jurisdiction of the subject matter."

On March 13, 1958, the United States District Court recited the finding that (Tr. 5-6) (A-5-6):

> ". . . the complaint fails to allege that any goods purchased by Plaintiff from outside the State of Florida were used in the construction of the motel referred to in the Complaint, and therefore the Complaint does not contain sufficient allegations that the Plaintiff was an industry or activity affecting interstate commerce at the time the acts of the Defendant were committed. . . ."

The District Court then ordered that the motion to dismiss be granted and that Respondent have twenty (20) days in which to file an amended complaint (Tr. 5-6) (A-5-6)

The district Court, in an Order of Dismissal dated April 7, 1958, after reciting that Respondent had not filed an amended complaint, ordered the complaint dismissed (Tr. 6-7) (A-6-7)

Thereafter, Notice of Appeal (Tr. 8) (A-8), Statement of Points (Tr. 9) (A-9), and Designation of Contents of Record on Appeal (Tr. 10 (A-10) were filed. The jurisdiction of the Federal Court was invoked under the provisions of Section 1291, Title 28, United States Code.

ARGUMENT

The principal point of concern of the District Judge was Paragraph 7 of the Respondent's Complaint (Tr. 1-3) (A-1-3) which reads as follows:

> "The Plaintiff was engaged in the construction of a motel at the job site known as the Howard Johnson Motel Lodge as general contractor. Acme Tile and Terrazzo Company was a sub-contractor on this same job, being engaged in installing tile and similar products on said job."

This paragraph coupled with the absence of an allegation that any products or goods purchased from out of State were used on the job site of this purely local activity prompted the District Court to require Respondents to amend and thus show that some amount of goods which flowed through interstate commerce was used in this purely local activity. The Respondents refused to make this amendment which led to the conclusion of the District Court that no materials, goods, or products that flowed through interstate commerce was used in this local activity and therefore was not a case within the jurisdiction of the District Court within the contemplation of Sec. 303 (b) of Labor Management Act as amended, 29, U.S.C.A., Sec. 187.

When Congress defined the term affecting commerce within the meaning of this act their intention was not to embrace the infinite number of labor disputes which occur within the boundaries of the State that do not lead to or tend to lead to a burdening or obstructing of commerce through its interstate channels. However some District Courts as well as some Courts of Appeals have construed or are willing to con-

strue this term as an all inclusive cradle to the grave mandate upon which to base additional neverending jurisdictional advances. If a stone is cast in the Gulf of Mexico there is repercussion in the Indian Ocean. If a citizen purchases a Coca-Cola in Tampa, Florida it tends to affect commerce in Atlanta, Georgia. However these strained illustrations did not exist in the minds of our congressmen when the term affecting commerce was defined by law. The United States Court of Appeals in the instant case strains the clear meaning and intent of the law when it holds that the construction of a local motel where there are no out of state goods in use tends to affect interstate commerce.

In *every* case cited by the respondents in their briefs below *(N.L.R.B. v. Denver Building and Construction Trades Council, et al,* 341 U. S. 675) *out of State materials were used on the job site.*

Although it is admitted that the respondent themselves are an industry affecting interstate commerce it was further admitted that they were not picketed at their industrial situs. The picketing occurred at a location where a purely local activity was being conducted by *some* employees of the Respondent as well as some employees of other firms which were not companies affecting interstate commerce.

If the ruling by the Court below is sustained or allowed to stand by this Court it will follow that if one employee of an industry affecting interstate commerce is doing work on the premises of a purely local activity such as the construction of a residential swimming pool said activity loses its local characteristics because of the presence of that one employee and becomes an ac-

tivity affecting interstate commerce. The Petitioner submits that Congress did not intend these results to occur when they passed the above said Act.

This case is a prime example of the maxim de minimis non curat lex. In the case of *Rauhoff et al, v. Henry Gamling and Co.*, 42 F. Supp. 754, the "affecting commerce" question was posed before District Judge Trimble who said as follows:

> "However, if it be conceded that these drop shipments did not lose their interstate commerce character yet their volume as compared to the whole business performed by the defendant is so small that the doctrine of de minimis non curat lex applies. National Labor Relations Board v. Fainblatt, 306 U. S. 601, 307 U. S. 609, 59 S. Ct. 668."

The case at bar is much stronger than the above quoted for applying the maxim de minimis in that none of the goods Respondent purchased from out of state was used in the activity where the dispute arose.

CONCLUSION

It is respectfully submitted that the Order of reversal entered by the United States Court of Appeals for the Fifth Circuit is erroneous and should be reversed and that the Order of the District Court of the United States for the Southern District of Florida is without error and should be confirmed.

Wherefore your Petitioners respectfully pray that this Honorable Court issue a Writ of Certiorari to review these Orders and Judgments.

Respectfully submitted,

FRANK MCCLUNG
Of Counsel for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed copies of the foregoing Petition for Writ of Certiorari to Fisher, Phillips & Allen, Rhodes-Haverty Building, Atlanta, Georgia, and Allen, Dell, Frank & Trinkle, 305 Morgan Street, Tampa, Florida, as Attorneys for Appellant, by United States first class mail, postage prepaid, this day of April, A. D., 1959.

FRANK MCCLUNG

APPENDIX A

TRANSCRIPT OF RECORD

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT

NO. 17,246

CONE BROTHERS CONTRACTING COMPANY,

Appellant,

versus

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, and CEMENT FINISHERS' UNION No. 3, FLORIDA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(ORIGINAL RECORD RECEIVED MAY 7/58.)

U. S. COURT OF APPEALS
FILED
JUNE 3, 1958
EDWARD W. WADSWORTH
CLERK

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COMPLAINT.

Filed Dec. 6, 1957.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION.

No. 3272.

CONE BROTHERS CONTRACTING COMPANY, a Florida corporation,

Plaintiff,

versus

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, and CEMENT FINISHERS' UNION No. 3, FLORIDA,

Defendant.

1. This is a suit for damages resulting from the activities of Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3, Florida, hereinafter called the "Union", in inducing and encouraging employees of this plaintiff to engage in a strike and concerted refusal in the course of their employment to use, handle or work on goods of this plaintiff, for the purpose of forcing the plaintiff and its sub-contractors to cease doing business with Acme Tile & Terrazzo Company, and for the purpose of forcing and requiring Acme Tile & Terrazzo Company to recognize and bargain with the defendant Union as the representative of Acme's employees, although said defendant Union has not been certified as the representative of such employees.

2. The jurisdiction of this Court is based upon Section 303 (b) of the Labor Management Relations Act as amended, 29 USCA, Section 187, hereinafter referred to as the "Act."

3. Plaintiff is a corporation incorporated under the laws of the State of Florida. At all times hereinafter mentioned it was engaged in the general contracting business, in construction and improvement of highways, roads, buildings and other structures. During the 12-month period next preceding the filing of this action, plaintiff purchased directly from sources outside the state of Florida goods the value of which was in excess of $500,000.00. Plaintiff is and has been engaged in an industry affecting commerce within the meaning of Section 303 (a) of the Act.

4. The Union is a labor organization within the meaning of Section 2, Subdivision 5 of the Act and was and is engaged in representing various employees of employers within this Court's jurisdiction.

5. On information and belief, plaintiff alleges that during the month of October, 1957, the Union attempted to organize employees of Acme Tile & Terrazzo Company and demanded that Acme recognize the Union as the representative of Acme's employees for the purpose of collective bargaining.

6. On information and belief plaintiff alleges that Acme declined to recognize the Union as such bargaining representative.

7. The plaintiff was engaged in the construction of a motel at the job site known as the Howard Johnson Motel Lodge as general contractor. Acme Tile & Terrazzo Company was a sub-contractor on this same job, being engaged in installing tile and similar products on said job.

8. On Wednesday, October 30, 1957, the defendant Union established a picket line at the job site known as the Howard Johnson Motel Lodge, 3688 Gandy Boulevard, Tampa, Florida. The purpose of said picket line was to induce the employees of plaintiff and its sub-contractors to engage in a strike or a concerted refusal in the course of their employment to work on the said Howard Johnson Motel Lodge job; to force Acme Tile & Terrazzo Company to recognize or bargain with said defendant Union, without said Union being certified as the representative of Acme's employees under the provisions of Section 9 of the Act; and to force plaintiff to cease doing business with Acme Tile & Terrazzo Company.

9. On October 30, 1957, the defendant Union, through its business manager, C. F. Wood, induced various employees of plaintiff and its sub-contractors to engage in a strike for the purposes aforesaid following the establishment of the picket line.

10. As a result of the aforesaid actions by said defendant Union this plaintiff has incurred a loss in the amount of $9800.00 resulting from the interruption to its business.

Wherefore, plaintiff demands judgment against the defendant in the amount of $15,000.00.

FISHER, PHILLIPS & ALLEN,
By L. ROBERT FRANK.
1410 Rhodes-Haverty Building,
Atlanta, Ga.

ALLEN, DELL, FRANK & TRENKLE,
By ERLE PHILLIPS.
305 Morgan Street,
Tampa, Fla.

MOTION TO DISMISS.

Filed Dec. 20, 1957.

(Title Omitted.)

Comes Now the Defendant, in the above styled cause, by its undersigned attorneys, and moves the Court to dismiss the complaint on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.

2. The Court lacks jurisdiction of the subject matter.

Wherefore the defendant moves to dismiss the complaint at the cost of the plaintiff.

FRANK McCLUNG,
(Frank McClung),
Attorney for the defense,
P. O. Box 623,
Brooksville, Florida.

RICHARD E. McGEE,
(Richard E. McGee),
Attorney for the defense.
P. O. Box 635,
Brooksville, Florida.

I Hereby Certify that a copy hereof was served by mail on Fisher, Phillips & Allen, 1410 Rhodes-Haverty Building, Atlanta, Georgia, and Allen, Dell, Frank & Trinkle, 305 Morgan Street, Tampa, Florida, Attorneys for Plaintiff, this 19th day of December, 1957.

FRANK McCLUNG.

ORDER GRANTING MOTION TO DISMISS.

Filed Mar. 13, 1958.

(Title Omitted.)

This Cause coming on to be heard upon Motion To Dismiss filed by the defendant, Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3 Florida, and the Court having heard argument of counsel for the respective parties and having examined the pleadings and

considered briefs filed by the parties, and being fully advised in the premises; and it appearing to the Court that the Complaint fails to allege that any goods purchased by the plaintiff from outside the State of Florida were used in the construction of the motel referred to in the Complaint, and, therefore, the Complaint does not contain sufficient allegations that the plaintiff was an industry or activity affecting Interstate Commerce at the time the acts of the defendant were committed, it is, thereupon

Ordered and Adjudged that the said Motion To Dismiss be, and the same is hereby, granted, and plaintiff is allowed twenty (20) days from the date hereof in which to file Amended Complaint.

Done and Ordered in Chambers at Tampa, Florida, this 13th day of March, 1958.

GEO. W. WHITEHURST,
United States District Judge.

A-7

ORDER OF DISMISSAL

Filed Apr. 7, 1958.

In the District Court of the United States, in and for the Southern District of Florida, Tampa Division.

Cone Brothers Contracting Company, a corporation,
Plaintiff,

Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3, Florida, Defendant.

Plaintiff not having filed its amended complaint as allowed in the Court's order of March 13, 1958, granting defendant's motion to dismiss, It Is

Ordered and Decreed that the above styled cause be and the same is hereby dismissed.

Done and Ordered at Tampa, Florida, this 7 day of April, 1958.

GEO. W. WHITEHURST,
District Judge.

NOTICE OF APPEAL.

Filed Apr. 11, 1958.

United States District Court for the Southern District of Florida, Tampa Division.

Cone Brothers Contracting Co., a Florida corporation, Plaintiff,

Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers and Cement Finishers' Union No. 3, Florida, Defendant.

Notice is hereby given that Cone Brothers Contracting Company, plaintiff above named, appeals to the Court of Appeals for the Fifth Circuit from the judgment entered in this action on the 13th day of March, 1958, which dismissed the complaint filed by plaintiff in this action.

Dated: April 11, 1958.

FISHER, PHILLIPS & ALLEN,
By ERLE PHILLIPS,
1410 Rhodes-Haverty Building,
Atlanta 3, Georgia.

ALLEN, DELL, FRANK & TRINKLE,
By L. ROBERT FRANK,
Attorneys for Appellant.
305 Morgan Street,
Tampa, Florida.

STATEMENT OF POINTS.

Filed Apr. 16, 1958.

(Title Omitted.)

In its appeal, appellant, plaintiff in the above entitled action, intends to rely upon the point that the District Court erred in holding that the complaint does not contain sufficient allegations that the plaintiff was an industry or activity affecting interstate commerce, within the meaning of Section 303, Labor Management Relations Act of 1947, as amended (29 U.S.C.A. 187), and in dismissing the complaint on that ground.

FISHER, PHILLIPS & ALLEN,
By ERLE PHILLIPS,
1410 Rhodes-Haverty Building,
Atlanta, Georgia:

ALLEN, DELL, FRANK & TRINKLE,
By L. ROBERT FRANK,
Attorneys for Appellant.

305 Morgan Street,
Tampa, Florida.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Filed Apr. 16, 1958.

(Title Omitted.)

Appellant Cone Brothers Contracting Company designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.

2. Defendant's Motion to Dismiss complaint.

3. Order of March 13, 1958, granting defendant's Motion to Dismiss complaint, and allowing plaintiff twenty (20) days in which to file amended complaint.

4. Order of April 7, 1958, dismissing the above styled cause.

5. Notice of Appeal filed April 11, 1958.

6. Statement of points on which appellant intends to rely, served herewith.

7. This designation.

FISHER, PHILLIPS & ALLEN,
By ERLE PHILLIPS,
1410 Rhodes-Haverty Building,
Atlanta, Georgia.

ALLEN, DELL, FRANK & TRINKLE,
By ROBERT FRANK,
Attorneys for Appellant.
305 Morgan Street,
Tampa, Florida.

CERTIFICATE OF CLERK.

United States of America,
Southern District of Florida.

I, JULIAN A. BLAKE, Clerk, United States District Court for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered one (1) to ten (10), inclusive, comprise a true and correct Transcript of Record wherein Cone Brothers Contracting Company, a Florida corporation, is plaintiff, and Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3, Florida, is defendant, prepared in accordance with the written directions of the respective parties, as the same appears from the records and files of this Court.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of this Court at Tampa, Florida, on this 1st day of May, 1958.

JULIAN A. BLAKE,
Clerk, United States District Court, Southern District of Florida.

By JOE A. LAW,
Deputy Clerk.

(Seal)

APPENDIX B

IN THE

UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 17,246

CONE BROTHERS CONTRACTING COMPANY,
Appellant,

versus

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, and CEMENT FINISHERS' UNION No. 3, FLORIDA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 3, 1959.)

Before RIVES, TUTTLE, and CAMERON, Circuit Judges.

RIVES, Circuit Judge: Pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C.A. §187,[1]

[1] "§187. *Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or en-

appellant-employer filed a complaint against appellee-union seeking to recover damages sustained by reason of a violation of said section. The complaint alleged

courage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employes in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order of certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawfol a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

"(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

"[1] So in original. Probably should read 'of.'"

that a dispute existed between the Union and Acme Tile & Terrazzo Company, a subcontractor working under a contract from the employer; that the Union picketed the employer's job site for the purpose of forcing the employer to cease doing business with Acme so that Acme would be compelled to recognize the Union, although it had not been certified as representative of Acme's employees; that the picket line induced various employees of the employer and of its subcontractor to leave the job, and the employer incurred a loss in the amount of $9,800.00 from the interruption of its business.

The critical averment was that made to support the conclusion that the employer "is and has been engaged in an industry affecting commerce within the meaning of Section 303 (a) of the Act." To sustain that conclusion, the complaint averred:

> ". . . At all times hereinafter mentioned it was engaged in the general contracting business, in construction and improvement of highways, roads, buildings and other structures. During the 12-month period next preceding the filing of this action, plaintiff purchased directly from sources outside the State of Florida goods the value of which was in excess of $500,000.00."

The Union moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief can be granted. The district court granted that motion, and, after the employer had declined to amend, dismissed the complaint. The trouble which the district court found with the complaint was thus expressed:

> ". . . the Complaint fails to allege that any goods purchased by the plaintiff from outside the State of Florida were used in the construction of the motel referred to in the Complaint, and, therefore, the Complaint does not contain sufficient allegations that the plaintiff was an industry or activity affecting Interstate Commerce at the time the acts of the defendant were committed, . . ."

We do not agree. It seems clear to us that the interstate commerce intended to be protected by the Act is not confined to the particular job but extends to all of the activities of the employer. For that reason, the proscribed conduct was made unlawful "in an industry *or* activity affecting commerce." (Emphasis supplied) See, footnote 1, *supra*. Section 2 of the Act, captioned "Definitions," provides in part:

> "When used in this subchapter—
>
> ". . . .
>
> "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

29 U.S.C.A. §152 (7). By that definition, "Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss v. Utah Labor Board*, 1957, 353 U.S. 1, 3; see also, *Polish Alliance v. Labor Board*, 1944, 322 U.S. 643, 647; *International Brotherhood v.*

National Labor Rel. Bd., 2d Cir. 1950, 181 F.2d 34, 36. In *Labor Board v. Renver Building Council*, 1951, 341 U.S. 675, in deciding a similar question the Supreme Court considered all activities of the employer and not just those activities on the job site where the picketing occurred.

The judgment of the district court dismissing the complaint was erroneous. That judgment is reversed and the cause remanded for disposition on its merits.

REVERSED AND REMANDED.

CAMERON, Circuit Judge, Dissenting:

> "The Congress shall have power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."

By these carefully chosen words of Section 8, Article I of the Constitution, the Sovereign States which formed the Union delegated to the national government all the power it has ever possessed over commerce between the States. To make sure that nobody would construe this and other like grants as lodging in the newly created government any other powers, they made the new Constitution effective only upon the terms expressed in the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Despite the torturing of language and distortion of the historical state-federal relationship in this field which have been employed in bringing that relationship to its present status, the majority is able to find no authoritative holding which would, under *stare decisis*, support the conclusion it announces.

In the absence of such a precedent it is our duty to look to the words of the Constitution itself—hardly recognizable under the plethora of writings about them. So looking, it is inconceivable to me, that we should hold that erection of a building under the facts of this case is anything but a local matter, with which the Federal Government has no legitimate concern and over which the Federal Courts have no jurisdiction.

The decision of the majority, in my opinion, sets a new precedent which cannot but augment the existing imbalance of state-federal relationships resulting from construction of these simple words of the Commerce Clause. Being so convinced with respect to an important question of constitutional construction, and feeling that it is regrettable that such a precedent should emanate from a section where, by and large, perspective has not been lost, I respectfully dissent.

APPENDIX C

NATIONAL LABOR RELATIONS ACT

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (29 U.S.C.A. 187)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 930

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, AND CEMENT FINISHERS' UNION NO. 3, FLORIDA

Petitioner,

versus

CONE BROTHERS CONTRACTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTARY APPENDIX

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THE FREE PRESS TAMPA FLORIDA

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SUPPLEMENTARY APPENDIX

JUDGMENT

Extract from the Minutes of February 3, 1959.

CONE BROTHERS CONTRACTING COMPANY,

No. 17246

versus

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS, AND CEMENT FINISHERS' UNION NO. 3, FLORIDA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for disposition on its merits;

It is further ordered and adjudged that the appellee, Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3, Florida, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Dissenting."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed copies of the foregoing Supplementary Appendix to Fisher, Phillips & Allen, Rhodes-Haverty Building, Atlanta, Georgia, and Allen, Dell, Frank & Trinkle, 305 Morgan Street, Tampa, Florida, as Attorneys for Appellant, by United States first class mail, postage prepaid, this day of May, A. D., 1959.

FRANK MCCLUNG

No. 930

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1958

BRICKLAYERS, MASONS, PLASTERERS, MARBLE MASONS, TILE LAYERS, TERRAZZO WORKERS AND CEMENT FINISHERS UNION No. 5, FLORIDA

PETITIONER

v.

GULF BUILDERS CORPORATION, ET AL.

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No. 930

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The
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PETITIONER

versus

CONE BROTHERS CONTRACTING COMPANY
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Pursuant to Rule 40, paragraph 3, of the Rules of this Honorable Court, Respondent adopts as correct statements contained in the Petition with respect to OPINIONS BELOW (Petition, pp. 1-2), CONSTITUTION AND STATUTORY provisions involved (Petition, pp. 3-4), and STATEMENT OF THE CASE (Petition, pp. 4-6).

JURISDICTION OF THE PETITION FOR WRIT OF CERTIORARI

The decisions arose from a complaint filed pursuant to the provisions of Section 303, Labor Management Relations Act, as amended (29 U.S.C.A. 187). The Supreme Court of the United States has jurisdiction to review the decisions entered herein by the United States Court of Appeals for the Fifth Circuit, but Respondent respectfully submits that an exercise of sound judicial discretion will deny review since the decisions herein do not conflict with the decision of any other United States Court of Appeals, do not decide issues not already decided by this Honorable Court, and are not in conflict with any decision of this Honorable Court.

QUESTIONS FOR DECISION UPON PETITION FOR CERTIORARI

I.

Whether or not Sound Judicial Discretion Will Allow a Writ of Certiorari Herein When the Decisions Below Do Not Conflict With the Decision of Any Other United States Court of Appeals, Do Not Decide Any Issue Not Already Decided by the Supreme Court and Are Not in Conflict With Any Decision of the Supreme Court.

II.

Whether or Not It is Necessary for Federal Jurisdiction Under Section 303, Labor Management Relations Act, That There be Interstate Flow At The Site of Dispute, If There Are Facts Alleged Establishing That the Industry or Activity of The Employer Affected By the Dispute is in Interstate Commerce.

III.

Whether or Not The Court of Appeals Erred in Entertaining Jurisdiction of the Appeal Where the Notice of Appeal Recited the Date of a Non-Final Order, But the STATEMENT OF POINTS, DESIGNATION OF RECORD and Contents of Final Order All Indicated Clear Intention that Appeal be Taken From the Latter Final Order.

ARGUMENT and CITATION OF AUTHORITY

At the outset, Respondent submits that in the exercise of sound judicial discretion, the petition for a writ of certiorari should be denied, since the decisions of the Court of Appeals are not in conflict with those of any other Circuit, are not in conflict with any decision of this Honorable Court, and do not decide issues not already decided by this Honorable Court.

POINT ONE

THE COURT OF APPEALS DID NOT ERR IN FINDING THE COMPLAINT HEREIN SUFFICIENTLY ALLEGED RESPONDENT IS "AN INDUSTRY OR ACTIVITY AFFECTING INTERSTATE COMMERCE," AS THAT TERM IS USED IN SECTION 303, LABOR MANAGEMENT RELATIONS ACT.

The Labor Management Relations Act (hereinafter called the Act), Section 2 (6) [29 U.S.C.A. 152 (6)], defines in explicit terms the meaning of "commerce" as used in that Act. The definition of the term "commerce" establishes that in the Act, Congress meant to exercise to the fullest its powers over interstate commerce. *Guss v. Utah Labor Relations Board* 353 U.S. 1; *N.L.R.B. v. Denver Building and Construction Trades Council, et al*, 341 U. S. 675; *National Polish Alliance v. N. L. R. B.*, 322 U. S. 643; *International Brotherhood of Electrical Workers, Local 501, et al, v. N. L. R. B.* (C.A. 2), 181 F. 2d. 34.

The term "affecting commerce" is defined in Section 2 (7) of the Act [29 U.S.C.A. 152 (7)]:

> "Sec. 2. When used in this Act . . . (7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing the free flow of commerce."

Under the definitions contained in the Act, the term "affecting commerce" must be given the same construction whether used, as here, in Section 303 (29 U.S.C.A. 187) or in reference to unfair labor practices, defined in Section 8 (a) and (b) of the Act [29 U.S.C.A. 158 (a) and (b)]; or in reference to elections as contained in Section 9 (a) - (h) of the Act [29 U.S.C.A. 159 (a) - (h)].

Both the Circuit Court of Appeals and the National Labor Relations Board have asserted jurisdiction over the Respondent in the past. *Cone Brothers Contracting Co. v. N.L.R.B.*, 235 F. 2d. 37 (1956); *Cone Brothers Contracting Co.*, 114 N.L.R.B. 303 (1955).

The complaint alleges Respondent is an industry affecting commerce and alleges facts to support that conclusion (TR 2). It is submitted that the Circuit Court was correct in holding the allegations sufficient to satisfy the requirement that Respondent be engaged in interstate commerce and is "an industry or activity affecting commerce" as that term is used in Section 303 of the Act (29 U.S.C.A. 187). *Local 74, United Brotherhood of Carpenters and Joiners of America, AFL, et al, v. N.L.R.B.*, 341 U.S. 947; *International Brotherhood of Electrical Workers, Local 501, et al, v. N.L.R.B.*, 181 F. 2d. 34 (C.A. 2).

POINT TWO

THE COURT OF APPEALS DID NOT ERR IN DECIDING THAT IT WAS NOT NECESSARY TO ALLEGE COMMERCE AT THE DISPUTE SITE, SINCE THE TRUE TEST OF JURISDICTION IS WHETHER THE INJURED PARTY IS ITSELF AN INDUSTRY AFFECTING COMMERCE.

Within the meaning of the term "an industry or activity affecting commerce" as used in Section 303 and throughout the Act, we submit that an industry (or employer) either affects commerce or does not affect commerce. Under the Act, if an industry affects commerce for one purpose of the Act, it affects commerce for all purposes of the Act. Thus, so long as an employer's operations affect commerce, the application of the Act cannot be defeated merely because the activity complained of occurred at a local site into which no interstate goods were flowing. *N.L.R.B. v. Denver Building and Construction Trades Council, et al*, 341 U.S. 675.

POINT THREE

THE COURT OF APPEALS DID NOT ERR IN ENTERTAINING JURISDICTION OF THE APPEAL, SINCE PETITIONER WAS NEITHER MISLED NOR OTHERWISE PREJUDICED BY MISSTATEMENT OF THE DATE OF THE ORDER APPEALED FROM.

In citing the incorrect date of the District Court Order from which appeal was taken, Petitioner was not misled nor in any other way prejudiced in preparing its case on appeal. Petitioner makes no contention that it was, in fact, either misled or prejudiced.

The error complained of was one of form, not substance, and within the discretion of the Court of Appeals to disregard. *Hoiness v. United States*, 335 U. S. 297; *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944, reversing 225 F. 2d. 876; *United States v. State of Arizona*, 346 U.S. 907, reversing 206 F. 2d. 159; *United States v. Elliott*, 223 U.S. 524. Rule 18, Rules of Circuit Court of Appeals, Fifth Circuit, adopting Rule 75 (h), Federal Rules of Civil Procedure.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Frank McClung and Richard E. McGee, Hernando State Bank Building, Brooksville, Florida, as attorneys for Petitioner by United States first class mail, postage prepaid, this ..... day of May, 1959.

WILLIAM H. AGNOR
OF COUNSEL